

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In Matter of

Implementation of the Local Competition
Provisions in the Telecommunications Act
of 1996

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CC Docket No. 96-98

COMMENTS OF
CORECOMM LIMITED

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Eric J. Branfman
Michael R. Romano
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (tel)
(202) 424-7645 (fax)

Dated: May 26, 1999

Counsel for CoreComm Limited

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EXECUTIVE SUMMARY

CoreComm Limited ("CoreComm") welcomes the Commission's prompt action in the wake of the Supreme Court's decision in *AT&T v. Iowa Utilities Board* to define the set of unbundled network elements ("UNEs") that must be made available to competitive local exchange carriers ("CLECs") under the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"). Without nondiscriminatory access to components of the incumbent's networks, CLECs will be unable to compete effectively with the incumbents. In fact, the plain language and procompetitive thrust of the Act give the Commission considerable authority and discretion to define which network components should be made available on an unbundled basis. Nothing in the Supreme Court's decision limits the Commission's authority or discretion in this regard. Rather, all that is required by the decision in *Iowa Utilities Board* is that the Commission explain in more detail why the availability of individual UNEs is "rationally related" to the goals of the Act and consistent with the statutory unbundling standards.

Establishing a national minimum list of UNEs in this rulemaking would further the development of competition and avoid the expense and administrative burden involved in litigating UNE access on a state-by-state basis. This national list would serve as a "floor," which states could supplement to address a demonstrated local need to a particular UNE that has not been identified in this rulemaking. By contrast, allowing states to remove UNEs from this list would flatly contradict the Commission's findings that certain UNEs need to be made available, and undermine the certainty associated with establishing a national minimum list in the first instance.

In considering the statutory "necessary" and "impair" standards that govern unbundling, CoreComm urges the Commission to examine the harm a competitor would suffer in the absence

of a UNE. The "necessary" standard – which is to be applied only in those limited circumstances when use of a UNE would *reveal* "proprietary" information – should involve a determination of whether the CLEC has a reasonable, effective alternative to use of the incumbent's network element. Under the "impair" standard, which applies to the vast majority of network elements, the Commission should consider whether the absence of a UNE would "materially" affect a CLEC's operations, so that it would be at an appreciable disadvantage to the incumbent or other carriers in competing for specific subscribers. Both of these tests will give meaning to the statutory standards while preventing incumbents from protecting all but their "essential facilities" from competitive access.

A proper application of these tests will result in each of the seven UNEs originally identified in the Commission's First Report and Order in this docket being made available on an ongoing basis. Since the absence of these UNEs would impair certain CLECs' ability to compete for customers on equal footing by materially affecting the cost, quality, ubiquity, or timeliness of service, each of these UNEs should be included on a national minimum list of UNEs going forward. Moreover, there are other network elements – including sub-loop components, inside wiring, and dark fiber – to which CLECs need access to compete effectively with the incumbents. CoreComm urges the Commission to add these UNEs to the national minimum list in accordance with the goals of the Act and the statutory unbundling standards.

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| of 1996 |) | |
| |) | |

**COMMENTS OF
CORECOMM LIMITED**

CoreComm Limited ("CoreComm"), by undersigned counsel, hereby submits its Comments regarding the Commission's consideration of how it should define the set of unbundled network elements ("UNEs") to which competitors should have nondiscriminatory access pursuant to the standards set forth in Sections 251(c)(3) and 251(d)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act").¹ As the Commission aptly noted in the introduction to its *Second Further NPRM*, "[t]he ability of requesting carriers to use unbundled network elements, including combinations of network elements, is integral to achieving the Act's objective of promoting rapid competition in the local telecommunications market."² CoreComm welcomes the Commission's prompt and thorough attention to this critical competitive matter, and urges the Commission to interpret the unbundling standards set forth in the Act in light of the statute's procompetitive intent.

¹ 47 U.S.C. §§ 251(c)(3) and (d)(2) (1996).

² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, Second Further Notice of Proposed Rulemaking (rel. Apr. 16, 1999) ("*Second Further NPRM*"), at ¶ 2.

CoreComm's operating subsidiaries are competitive local exchange carriers ("CLECs") currently providing both residential and business service in 13 states in the incumbent territories of Ameritech and Bell Atlantic. Although the company is currently providing local exchange services as a reseller, it is also in the process of deploying its own facilities pursuant to its Smart Local Exchange Carrier ("Smart LEC") strategy directed toward creating a national, facilities-based broadband network. Unlike many other competitive entrants, CoreComm is particularly focused on serving the residential marketplace through a bundling and customer care strategy perfected by CoreComm's commonly managed affiliate in the United Kingdom.³ In furtherance of its Smart LEC plan, CoreComm has purchased the advanced operational support systems, customer accounts and other assets of USN Communications, Inc., which currently provides competitive telecommunications services to tens of thousands of residential and business customers in the Ameritech and Bell Atlantic services territories, as well as MegsINet, a national Internet service provider and regional CLEC with its own advanced network.

As it expands its operations in Ameritech and Bell Atlantic's incumbent areas, CoreComm intends to make increasing use of high-quality, cost-based UNEs from the ILECs to reach those residential customers that may be beyond the reach of most competitive carriers' facilities. CoreComm views the use of ILEC UNEs as the most economical and operationally efficient means

³ CoreComm shares common executive management with NTL, Inc., the second largest competitive provider of broadband services in the United Kingdom, with more than 1.3 residential customers receiving telephone, television and Internet access services.

of reaching its consumers and offering them the benefits of competition. Without access to the integral ILEC UNEs, CoreComm's ability to reach major portions of its target market could be crippled. For this reason and the reasoning set forth herein, CoreComm therefore believes that there is a rational basis and sound cause for the Commission to ratify the existing national list of UNEs and to identify other UNEs to which competitors require access on a nationwide basis in order to compete effectively in the local exchange market.

I. THE COMMISSION HAS BROAD AUTHORITY AND DISCRETION UNDER THE ACT TO IDENTIFY UNES TO WHICH COMPETITORS SHOULD HAVE ACCESS.

A. The Act Provides the Commission with Considerable Authority and Discretion in Designating Appropriate UNEs.

Before discussing how the Commission should identify UNEs or what UNEs it should identify, CoreComm believes it is necessary to consider the scope of the Commission's authority to engage in such an exercise. The source of this authority comes from several sections of the Act. First, Section 251(c)(3) of the Act requires ILECs to provide requesting telecommunications carriers with nondiscriminatory access to "network elements on an unbundled basis."⁴ Section 3(29) of the Act, in turn, broadly defines "network element" to mean "a facility or equipment used in the provision of a telecommunications service." The definition continues by stating that the term "network element" includes "features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information

⁴ 47 U.S.C. § 251(c)(3) (1996).

sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."⁵ Finally, Section 251(d)(2) empowers the Commission to determine, pursuant to certain standards, what network elements should be made available for the purposes of subsection (c)(3).⁶

These sections of the Act make clear that Congress intended for the Commission to exercise its expertise in defining what should constitute a UNE. Moreover, it is clear from the broad definition of "network element" contained in Section 3(29) that except for the standards set forth in Section 251(d)(2) – which will be discussed at length below – the Commission has broad authority and discretion in defining precisely what constitutes a network element.⁷ Indeed, the statute places no limitations on the Commission's ability to consider a range of factors (technical, economic, or practical) in assessing what UNEs should be made available. CoreComm submits that giving consideration to these factors, as well as the specific standards set forth in Section 251(d)(2), is appropriate and warranted in light of the procompetitive intent of the Act.⁸

⁵ *Id.* at § 153(29).

⁶ *Id.* at § 251(d)(2).

⁷ In vacating the Commission's rule defining the scope of competitor access to ILEC UNEs, the Court noted "the breadth of this definition" of "network element" contained in Section 3(29) of the Act. *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721, 734 (1999).

⁸ *See* Preamble, Telecommunications Act of 1996 (stating that the purpose of the act is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies").

B. The Supreme Court's Decision in *Iowa Utilities Board* Reaffirms the Commission's Broad Authority to Designate UNEs as Long as Those Designations are Rationally Related to Promoting the Goals of the Act.

Nothing in the Supreme Court's *Iowa Utilities Board* decision limits the broad statutory grant of authority and discretion described immediately above. Although this decision vacated the Commission's rule defining the scope of competitor access to UNEs, the Supreme Court did not do so because it found the Commission's list substantively problematic or because it believed that the Commission had exceeded its authority or unreasonably exercised its discretion. (To the contrary, the Court stated that "the Commission's application of the 'network element' definition is eminently reasonable."⁹) Rather, the Court vacated Rule 51.319 because it concluded that the Commission had failed to enunciate adequately how the UNEs it had identified were "rationally related" to the goals of the Act, consistent with the statutory standards set forth in Section 251(d)(2) of the Act.¹⁰ Thus, all that is required in the wake of the Supreme Court's *Iowa Utilities Board* decision is a demonstration that whatever UNEs are identified by the Commission comply with the standards of Section 251(d)(2) and are "rationally related" to the procompetitive goals of the Act, based upon the evidence and comments that will be submitted in this proceeding.

⁹ *Iowa Utils. Bd.*, 119 S.Ct. at 734 (citing *Chevron v. NRDC*, 467 U.S. 837, 866 (1984)).

¹⁰ Specifically, the Court held that the Commission had not applied "some limiting standard, rationally related to the goals of the Act" in promulgating 47 C.F.R. § 51.319.

This demonstration of a "rational relationship" is not a high evidentiary hurdle. Indeed, where an agency takes action to promote a defined policy objective – particularly where that action involves interpretation of a statute left to the expert judgment of the agency – a court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator or agency."¹¹ In *Chevron v. NRDC*, the Supreme Court further articulated this principle:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹²

The court in *Chevron* went on to state that if the agency's interpretation of a statute is a "permissible construction," then "considerable weight" should be accorded to that interpretation.¹³ In determining whether the agency's interpretation is in fact a permissible construction, the *Chevron* decision makes clear that courts should consider whether: (i) "the regulatory scheme is technical and complex;" (ii)

¹¹ *Chevron*, 467 U.S. at 844.

¹² *Id.* at 842-43.

¹³ *Id.* at 844.

"the agency considered the matter in a detailed and reasoned fashion;" (iii) "and the decision involves reconciling conflicting policies."¹⁴

In the case of identifying UNEs, there is little question that Congress left to the Commission the question of defining "necessary" and "impair," and designating the network elements that meet those standards. Indeed, the Supreme Court's decision to vacate the Commission's rule relates primarily to the question of whether the Commission's interpretation of "necessary" and "impair" was permissible. Specifically, the Court's decision appears to hinge upon the second *Chevron* factor – the consideration of the matter in a detailed and reasoned fashion. In finding that the Commission had not considered the standards of Section 251(d)(2) in promulgating its rule, the *Iowa Utilities Board* Court directed the Commission "to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."¹⁵ Thus, in light of the broad authority and discretion provided to the Commission under the Act and the narrow rationale for the Supreme Court's decision to vacate the UNE rule, as long as the Commission provides an adequately detailed explanation of the "rational basis" upon which it makes its UNE determinations, it will be entitled to substantial deference in making such determinations.

¹⁴ *Id.* at 865 (citations omitted).

¹⁵ *Iowa Utils. Bd.*, 119 S.Ct. at 736.

II. ESTABLISHING A NATIONAL "FLOOR" OF UNES WOULD PROMOTE THE PROCOMPETITIVE PURPOSE OF THE TELECOMMUNICATIONS ACT.

A. The Commission Has a Rational Basis for Establishing a National Minimum List of UNEs.

CoreComm fully supports the Commission's tentative conclusion to identify a minimum set of network elements that must be unbundled on a nationwide basis.¹⁶ As noted above, the Supreme Court's *Iowa Utilities Board* opinion did nothing to limit the Commission's authority or discretion in identifying UNEs or establishing a national list of UNEs. Rather, the Supreme Court's decision only required that the Commission explain further the "rational basis" for identifying specific UNEs in light of the goals of the Act. In fact, a review of the Commission's *Local Competition Order* reveals that the Commission's reasoning for adopting a national minimum list of UNEs in 1996 remains valid and consistent with the goals of the Act today.

For example, it remains true that a national minimum list of UNEs would allow requesting carriers to take advantage of economies of scale in network design.¹⁷ Indeed, as competitors such as CoreComm reach out beyond their initial markets to establish a presence in markets across the country, the potential burden of fifty different unbundling requirements first noted in the *Local Competition Order* would become even more acute today than was the case in 1996 (when very few

¹⁶ *Second Further NPRM*, at ¶ 14.

¹⁷ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15624 (1996).

carriers were prepared to make use of UNEs on a nationwide basis).¹⁸ CoreComm's efforts to develop a national strategy for providing competitive choices to consumers could be significantly impaired if states impose different requirements with respect to UNEs. Similarly, as many of the "first generation" interconnection agreements are now expiring or are due to expire in the coming year, there is as much (if not more) of a likelihood now than in 1996 that it would require costly, complicated arbitration and litigation to resolve UNE requirements on a state-by-state basis.¹⁹ Thus, the reasons that prompted the Commission to adopt a national minimum list of UNEs in 1996 still provide a "rational basis" today for adopting a national minimum list.

By contrast, allowing states to "determine in the first instance that a network element need not be unbundled"²⁰ would undermine the procompetitive goals of the Act by preventing CLECs from taking advantage of economies of scale and geographic scope, and increasing the likelihood of costly and time-consuming arbitration and litigation. Giving the states the ability to define a patchwork of UNE obligations would be disruptive to carrier business plans and generate uncertainty in the early competitive stages of the local exchange market by adding operational complexity and impeding carriers' plans to expand geographically. Indeed, it would be particularly troubling and confusing if states were to issue inconsistent rulings with respect to the same potential UNE. Finally, it is the Commission – not the states – that is charged with interpreting *and* implementing

¹⁸ *See id.* at 15624, ¶ 242.

¹⁹ *See id.*

²⁰ *Second Further NPRM*, at ¶ 14.

Section 251 in general,²¹ and the statutory unbundling requirements in particular.²² The Commission should not abdicate this responsibility by allowing the states to take a "first cut" at determining that a particular UNE need not be made available, even if the states act in accordance with the Commission's interpretation. Where Congress intended for the state commissions to play a role in implementing the Telecommunications Act of 1996 in the first instance, it certainly knew how to make such a role clear.²³ The Commission should not permit states to make an initial determination that a particular network element need not be unbundled under the Act.

B. States Should be Permitted to Build Upon, But Not Detract From, the Commission's National Minimum UNE List.

Although the Commission has the obligation under the Act to interpret the unbundling requirements in the statute and to implement that interpretation "in the first instance," there is no reason that the states should be prohibited from enhancing this national minimum list of UNEs once it has been established. CoreComm therefore agrees with the Commission's preliminary determination that it should not "eliminate the states' authority to impose additional unbundling requirements, pursuant to the standards and criteria we adopt in this proceeding."²⁴ The national list

²¹ 47 U.S.C. § 251(d)(1) (1996).

²² *Id.* at § 251(d)(2).

²³ *See, e.g., id.* at § 252(a)(1)-(3) (establishing role for states in approving negotiated agreements, and in mediating and arbitrating interconnection disputes); § 252(d)(1)-(3) (allowing states to develop prices for interconnection, network elements, transport and termination, and resold services based upon the Commission's interpretation of the Act).

²⁴ *Second Further NPRM*, at ¶ 14.

would serve most effectively as a "floor," representing those UNEs to which the Commission has determined CLECs need consistent, nationwide access in accordance with the goals of the Act. States should be permitted to supplement this list as necessary – in accordance with the criteria established by the Commission in this rulemaking – to address a demonstrated local need for a particular UNE that has not already been identified by the Commission. The Commission should therefore maintain Section 51.317 of its rules upon remand, and revise it consistent with the unbundling criteria adopted as a result of this rulemaking.²⁵

For the reasons identified in section II.A. above, however, there is a rational basis to prohibit the states from removing UNEs from the national minimum list, or from taking action that would obstruct, impede, or otherwise render it more difficult for CLECs to access and make use of UNEs on the list. Although the Commission seeks comment on whether states should have the ability to declare that a certain network element need not be unbundled,²⁶ allowing states to remove – or even place restrictions on the use of – individual UNEs from a national minimum list would render meaningless the very exercise of establishing such a "minimum" list in the first instance. Furthermore, permitting each state to eliminate specific UNEs from the national list or place

²⁵ See 47 C.F.R. § 51.317 (1998) (setting forth the criteria by which state commissions may identify additional UNEs to be made available to competitors by ILECs). As footnote 21 of the *Second Further NPRM* makes clear, this rule is only at issue here because the Commission asked for a "voluntary remand." Thus, nothing in the Eighth Circuit or Supreme Court decisions provides any reason to invalidate this rule.

²⁶ *Second Further NPRM*, at ¶ 14

conditions on the use of UNEs on that list would result in clear (and potentially preemptive) conflicts with the Commission's prior reasonable findings that access to each of the UNEs on the list is in fact needed on a national basis. States should therefore be prohibited from removing UNEs from the national minimum list established by the Commission, or imposing any conditions or restrictions upon access to, or use of, UNEs set forth on that list (although nothing would prevent them from revisiting and removing "supplemental" UNEs that they have added to the national list independently).

III. THE COMMISSION SHOULD INTERPRET THE STATUTORY TERMS "NECESSARY" AND "IMPAIR" TO ENSURE THAT COMPETITORS HAVE THE EQUIVALENT ABILITY AS INCUMBENTS TO COMPETE FOR EACH AND EVERY CUSTOMER IN THE LOCAL EXCHANGE MARKETPLACE.

A. The Unbundling Standards Set Forth in Section 251(d)(2) Should Be Interpreted by Considering How a Competitor Would Operate in the Absence of a Particular UNE.

The Commission faces two tasks upon remand in interpreting Section 251(d)(2) and identifying specific network elements that meet the unbundling criteria of that statute. First, the Commission must address the Supreme Court's concern that it not "blind itself to the availability of elements outside the incumbent's network."²⁷ Second, the Commission must address the criticism that its prior unbundling rule rested upon the "assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary,' and causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired

²⁷ *Iowa Utils. Bd.*, 119 S.Ct. at 735.

services"²⁸ CoreComm believes that the optimal manner for the Commission to address these concerns – while still serving the procompetitive thrust of the Act – is to take a more precise look at the potential competitive harm a CLEC would suffer in the absence of a particular network element. In short, if there is no reasonable, effective alternative to the network element available ("necessary"), or if the inability to access a network element would hinder an efficient CLEC's ability to compete with the ILEC or another carrier for a specific customer ("impair"), then that network element must satisfy the statutory requirements and be defined as a UNE. Giving consideration to the likely potential competitive harm a CLEC would suffer from an inability to access a UNE would provide the "rational basis" the Supreme Court sought in vacating the prior unbundling rule, and would promote the objective that CLECs should have an equal opportunity to serve each and every customer in the local exchange market.

Before engaging in a substantive definitional analysis of the terms "necessary" and "impair" in Section 251(d)(2), it is critical to understand when these terms govern, and to recognize that there must be some difference between the standards.²⁹ CoreComm concurs with the Commission's understanding of the application of these standards. Specifically, the Commission has concluded that nothing in the decisions of the Eighth Circuit or the Supreme Court alters its prior finding that "the 'necessary' standard only applies to 'proprietary' network elements"³⁰ Indeed, the division

²⁸ *Id.* (emphasis added).

²⁹ *See Second Further NPRM*, at ¶¶ 18-19.

³⁰ *Id.* at ¶ 19.

of Section 251(d)(2) into subparagraphs (A) and (B) separates the terms "necessary" and "impair" in such a manner that it is clear that the former applies only to proprietary network elements, while the latter applies to all network elements. The question then becomes how to define these two standards.

1. The Commission Should Define "Proprietary" in the Narrowest Possible Sense, and Apply it in Only the Most Limited of Circumstances.

Because the "necessary" standard applies only in the context of "proprietary" network elements, the Commission should first consider the question of what is meant by "proprietary" before considering under what circumstances access to such elements should be provided. The Commission should define narrowly what constitutes a "proprietary" element. If a protocol, function, feature, interface or other piece of information is not specific to the carrier in question, there is no basis for concluding that the item in question is proprietary to that carrier. For example, any protocol that adheres to a Bellcore general requirement can hardly be considered carrier-specific.³¹ Likewise, if several vendors make the same product or protocol available to carriers, there is no reason to believe that the product in question requires special protection. In addition, if the standards for the allegedly "proprietary" function or feature are established by an industry standard-setting body, it is clear that the ILEC does not in fact have some interest in that standard that requires

³¹ See *Local Competition Order*, at 15739, ¶ 481.

protection.³² Indeed, if the standard is not specific to the carrier in question, CoreComm fails to see how the standard could ever be considered "proprietary" to that carrier.

Even if a network element is found to include proprietary information under this narrow definition, the next step of the inquiry is to consider whether it truly needs to be excluded from the unbundling process. In light of the procompetitive intent of the Act, CoreComm submits that a network element should only be deemed proprietary in the most limited of circumstances, when unbundling would result in the unprotected *disclosure* of the ILEC's proprietary information. As the Commission found in mandating the unbundling of loops in its *Local Competition Order*, the mere fact that some loop equipment may contain proprietary information is insufficient to deem the loop itself proprietary. The Commission aptly noted that concerns about the proprietary nature of an network element would only arise if such information "would be *revealed* if loops using such equipment were unbundled."³³ Thus, there is no reason to consider a network element "proprietary" for the purposes of the statute simply because it "contains" proprietary information.³⁴ It should be made clear that even UNEs that contain such information must be made available to competitors unless their unbundling would necessarily *reveal* the proprietary information without adequate non-

³² See *Second Further NPRM*, at ¶ 15 (referencing ITU, ANSI, and IEEE standard-setting bodies).

³³ *Local Competition Order*, at 15694, ¶ 388 (emphasis added).

³⁴ See *Second Further NPRM*, at ¶ 15. See also *Local Competition Order*, at 15641, ¶282 (defining "proprietary elements" as "elements with proprietary protocols or elements containing proprietary information").

disclosure protections. The Commission should also make clear that if an ILEC can unbundle a network element in a manner that avoids the unfettered disclosure of proprietary information, it must do so.³⁵

Finally, in the interest of minimizing disputes and litigation over subsequently defined UNEs, the ILECs should bear the burden of proving that: (i) certain information is proprietary and; (ii) unbundling a network element would reveal this proprietary information without adequate non-disclosure protections. It can be difficult for CLECs and regulators to gain access to even the non-proprietary information associated with an ILEC's network. Moreover, by definition, only the ILECs will have access to their proprietary information. A CLEC attempting to gain access to a network element on an unbundled basis will not be able to disprove ILEC claims about the proprietary nature of that network element because the ILEC will hold all relevant information. In light of this asymmetric access to such allegedly proprietary information, it is reasonable and

³⁵ Companies reveal "proprietary" information all the time, subject to adequate confidentiality protections such as a protective order or non-disclosure agreement. Rather than allowing ILECs to narrow their unbundling obligations with respect to network elements where disclosure of proprietary information is in fact likely, the Commission should require that ILECs utilize non-disclosure agreements with requesting carriers to remedy any concerns about the allegedly proprietary nature of the element in question. Under this standard, where something akin to a non-disclosure agreement is in place, a UNE would not be considered "proprietary" even if such information is disclosed to a party to that agreement.

appropriate to require the ILECs to carry the burden of proof with respect to any dispute over the proprietary nature of a particular UNE.³⁶

2. The Question of Whether Access to a Particular Network Element is "Necessary" Will Arise in Only the Most Limited of Circumstances, and Should be Resolved by Considering the Effective Available Alternatives to Use of that UNE.

Because the "necessary" standard applies only in the context of proprietary network elements – and because network elements should be considered "proprietary" for the purpose of Section 251(d)(2) in only the most limited of circumstances – CoreComm would expect that the question of when it is "necessary" to unbundle a network element will arise infrequently. When the opportunity to review the necessity of access to a proprietary network element does arise, however, the Commission's focus must be on whether a CLEC seeking access could instead use an available, reasonable, effective alternative to that network element. If the alternatives available in a market through self-provisioning or from other carriers (or even through other choices offered by the ILEC itself) do not allow an efficient CLEC to compete in the same manner on relatively equal footing with the ILEC for the business of a customer, then the network element in question must be considered "necessary." There are a number of factors to consider in engaging in this kind of analysis, including: (i) would there be is a functional equivalent to the ILEC's UNE in terms of price, quality, ubiquity, and interoperability? (ii) could the alternative element be made available for

³⁶ The Commission has previously placed the burden of proof on the ILECs in other contexts because of such uneven access to necessary data. *See Local Competition Order*, at 15847, ¶ 680.

the CLEC's use in as timely a manner as the ILEC's UNE? (iii) would the CLEC incur additional costs or delay in attempting to use the alternative element in conjunction with its own network? and (iv) would the alternative that is available force the CLEC to change its way of doing business?

In considering these factors and the alternatives to unbundling, the Commission will need to look to prospective alternatives from other carriers, the prospect of self-provisioning, and even alternatives provided by the incumbent itself.³⁷ Several overarching points must also be made. First, a CLEC's ability to self-provision to a proprietary ILEC network element should not be overstated. While it may be possible for a CLEC to deploy a given loop or extend transport along a given route, the Commission must be careful not to read a build-out requirement into the Act. The Commission has previously rejected the notion that CLECs "must own or control some of their own local exchange facilities before they can purchase and use unbundled elements to provide a telecommunications service."³⁸

The second point relates to the last factor identified above – whether a CLEC would be required to modify its entry strategy to take advantage of the alternative to the network element in question. The Act effectively provides for four modes of competitive entry: (i) fully facilities-based operations; (ii) facilities-based operations that make use of ILEC UNEs; (iii) complete use of ILEC UNEs; and (iv) resale. CoreComm, which has already made use of resale and is now preparing to

³⁷ *Iowa Utils. Bd.*, 119 S.Ct. at 736 (prompting the Commission to consider the availability of elements "outside the [ILEC] network").

³⁸ *Local Competition Order*, at 15666, ¶ 328.

purchase UNEs from the ILECs for use together with the facilities it is putting in place, has found that the flexibility afforded by these various entry options is critical to timely and successful competitive entry and in establishing a viable, cost-effective business plan. Yet promulgating a rule that could effectively require new entrants like CoreComm to modify their means of entry and operating would interfere far too greatly in the independence of the telecommunications market and stymie creativity in the competitive telecommunications industry. Such a limiting rule would also prevent CLECs from offering the full range of service options to all customers, as envisioned by the Act. Accordingly, in considering whether a UNE is "necessary," the Commission should under no circumstances consider whether a carrier might employ another means of entry in lieu of making use of the UNE in question.

3. If a Competitor's Ability to Compete with the ILEC is Adversely Affected by the Absence of a Non-Proprietary Network Element, the ILEC Should be Required to Unbundle that Network Element.

In rejecting the Commission's prior interpretation of the statutory term "impair," the Supreme Court found that the Commission erred by concluding that "any" increase in cost or decrease in quality resulting from the absence of a UNE would "impair" a carrier's ability to provide service.³⁹ To balance properly the procompetitive intent of the statute with the need to impose some meaningful "limiting standard" on access to non-proprietary UNEs, CoreComm proposes that the Commission adopt a narrowly developed "materiality" concept in defining "impair." Specifically,

³⁹ *Iowa Utils. Bd.*, 119 S.Ct. at 735; *see also Local Competition Order*, at 15643, ¶ 285.

under Section 251(d)(2), a "non-proprietary" UNE should be made available whenever its absence could be expected to "impair" a CLEC in some material respect (in terms of cost, schedule, or quality) as it attempts to compete for customers. "Material" should not be interpreted broadly, however, to mean something akin to "substantial" or "significant" on absolute terms. Rather, "material" must be defined in light of the concept of parity that is embodied throughout the Act. In other words, if the absence of a UNE could be expected to hinder an efficient CLEC's ability to serve a customer because the inability to access that element would be reasonably likely to result in costs or scheduling delays or quality concerns that would make a CLEC's service less desirable to end users, the UNE should be made available under the statutory "impair" standard. For example, if a CLEC's inability to obtain unbundled transport from the ILEC drove up its costs (because other providers' prices are higher) or affected network interoperability (because the transport available from others is not easily assimilated with other network components) such that it is likely that the absence of unbundled transport from the ILEC would noticeably affect the CLEC's ability to compete with the ILEC, transport would need to be unbundled under Section 251(d)(2)(B).

To give further teeth to the term "impair" in the context of how the absence of a UNE could potentially affect carriers competing for customers, the most appropriate analogy might be to consider the Commission's determination of how number portability cost recovery affects carriers as they compete for customers. Section 251(e)(2) of the Act provides that the costs of number

portability are to be borne by all telecommunications carriers "on a competitively neutral basis."⁴⁰

In various orders in CC Docket No. 95-116, the Commission has interpreted this "competitively neutral" standard to mean the number portability cost recovery "does not affect significantly any carrier's ability to compete with other carriers for customers in the marketplace."⁴¹ A similar concept makes sense in the context of access to "non-proprietary" UNEs – to the extent that the inability to access a UNE could be expected to put a CLEC at an disadvantage vis-a-vis the incumbent in competing for customers, that inability would materially "impair" the CLEC's ability to provide service within the meaning of Section 251(d)(2)(B) of the Act.

In considering the impact of a CLEC's inability to access a particular UNE, there are a number of factors that the Commission should consider. In fact, CoreComm believes that the factors used in the context of examining whether the absence of a UNE would materially "impair" a CLEC's ability to compete on a prospective basis are similar to those considered in determining whether access to a "proprietary" network element is "necessary": (i) is it reasonable to expect that the absence of the ILEC's UNE would impair in some respect an efficient CLEC's operations in terms of cost, quality, ubiquity (*i.e.*, ability to reach certain customers), and interoperability (*i.e.* technical

⁴⁰ 47 U.S.C. § 251(e)(2) (1996).

⁴¹ *Telephone Number Portability*, First Report and Order, 11 FCC Rcd 8352, 8419 (1996), at ¶ 131; *see also Telephone Number Portability*, CC Docket No. 95-116, Third Report and Order, 13 FCC Rcd 11701, 11731 (1998), at ¶ 53 (stating that the recovery of number portability costs "must not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber").

problems arising because the UNE is not available)? (ii) is it reasonable to expect that the absence of the ILEC's UNE would impair in some respect a CLEC's ability to provide service to end users in a timely manner? and (iii) is it reasonable to expect that the absence of the UNE would impair a CLEC's ability to conduct business according to its business plan?

The Commission should keep in mind the market-opening purpose of the Act in applying these factors – and other factors – to potential UNEs. Where the absence of a non-proprietary UNE would give the ILEC an appreciable, incremental competitive advantage over a CLEC in terms of cost, schedule, quality, interoperability, or ubiquity, then that UNE should be made available by the ILEC pursuant to Section 251(d)(2)(B) of the Act. Likewise, in light of the intent to make four different entry strategies available to CLECs, the Commission should find that a CLEC's operations would be impaired for the purposes of Section 251(d)(2)(B) where a CLEC would be forced to pursue a different entry strategy merely because the ILEC declines to make a UNE available. Moreover, the Commission should ensure that the factors listed above are not applied in a static manner, particularly as they relate to UNEs subsequently considered by state commissions following the completion of this rulemaking. It would be contrary to the intent of the Telecommunications Act of 1996 to deny CLECs certain UNEs simply because the "impairment" concerns do not fit precisely within the criteria noted above.

B. The "Essential Facilities" Doctrine Should Not be Applied in Interpreting the Terms "Necessary" and "Impair."

As the Commission noted in its *Second Further NPRM*, ILECs continue to assert that "section 251(d)(2) codifies a standard similar to the 'essential facilities' doctrine, as defined in antitrust jurisprudence."⁴² CoreComm would expect the ILECs to cling stubbornly to this argument in filings before this Commission as well. The Commission's comment in the *Second Further NPRM*, however, hints at what is the critical flaw in the ILECs' reasoning. The "essential facilities" doctrine is a well-defined, long-standing concept of "antitrust jurisprudence," dating back at least to the Supreme Court's 1912 decision in *United States v. Terminal Railroad Assn.*⁴³ If Congress had truly intended for this more stringent doctrine to apply in the context of determining those UNEs to which CLECs should have access, it certainly would have stated that intent expressly.⁴⁴

⁴² *Second Further NPRM*, at ¶ 22 (citations omitted).

⁴³ 224 U.S. 383 (1912); *see also MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1982) (discussing more recent cases addressing the "essential facilities" doctrine).

⁴⁴ Indeed, federal courts have often read the "essential facilities" doctrine to require a much greater showing of harm than simple impairment. As at least one court has found, plaintiffs must show that denial of access to defendant's facility will result in a "severe handicap" to it. *City of Chanute v. Williams Nat. Gas Co.*, 1992-1 Trade Cas. ¶ 69,703 (10th Cir. 1992); *see also Alaska Airlines v. United Airlines*, 948 F.2d 536, 544-46 (9th Cir. 1991) (denial of access would only impose financial burden on excluded competitors, not "eliminate" them); *Twin Labs. v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990) ("plaintiff must show more than inconvenience, or some economic loss; he must show that an alternative to the facility is not feasible."); *Florida Fuels, Inc. v. Belcher Oil Co.*, 717 F.Supp. 1528, 1533 (S.D. Fla. 1989) (an inquiry into the practicality of duplicating the facility should consider economic, regulatory and other concerns. Although expensive in absolute terms, the cost of duplication may be reasonable in light of transactions that would be duplicated and the possible profits to be gained.)

The Supreme Court's *Iowa Utilities Board* decision provides no reason to read an "essential facilities" requirement into the statute now. All that is required under the Supreme Court's ruling is that the Commission apply some "limiting standard" in defining the scope of Section 251(d)(2).⁴⁵ Nothing in that decision compels the Commission to retreat all the way back to the "essential facilities" doctrine in applying a limiting standard. In fact, the Supreme Court expressly declined to make such a ruling, and noted that, with respect to the "essential facilities" doctrine, "it may be that *some other standard would provide an equivalent or better criterion* for the limitation upon network element availability that the statute has in mind."⁴⁶ Thus, while the Commission is free to adopt a limiting standard that is "rationally related" to the procompetitive goals of the Act and pays heed to the terms "necessary" and "impair" in Section 251(d)(2), it need not reach the "essential facilities" doctrine to do so. Indeed, for the reasons provided above, CoreComm submits it is more reasonable and consistent with the intent of the Act to define "necessary" and "impair" by measuring the potentially adverse impact upon CLECs (in terms of their ability to compete on equal footing for customers) when UNEs are unavailable.

⁴⁵ *Iowa Utils. Bd.*, 119 S.Ct. at 734.

⁴⁶ *Id.* at 735 (emphasis added).

IV. THERE IS GOOD CAUSE UNDER THE "NECESSARY" AND "IMPAIR" STANDARDS TO CONFIRM THAT THE EXISTING LIST OF UNES WILL BE MADE AVAILABLE AND ALSO TO DESIGNATE ADDITIONAL UNES.

A. The Seven UNEs Originally Identified by the Commission Each Have a Rational Relationship to the Goals of the Act and Satisfy the Statutory Unbundling Standards.

As discussed above, the Commission has considerable authority and discretion in defining certain network elements as UNEs, as long as the Commission's reasoning is adequately articulated and has a rational basis to the procompetitive objectives of the Act. Nothing in the Supreme Court's *Iowa Utilities Board* decision calls upon the Commission to promulgate a new, narrower list of UNEs, but only to justify better whatever list of UNEs it does produce in light of the statutory standards. For the reasons explained below, CoreComm urges the Commission to conclude that each of the UNEs originally identified in the *Local Competition Order* should continue to be made available by the ILECs under the "necessary" and "impair" standards of the statute and the guidance provided by the Supreme Court.⁴⁷

1. Loops

There is no sound basis for excluding loops from the list of network elements that must be available to competitors on an unbundled basis. Congress, in the Joint Explanatory Statement

⁴⁷ It should also be noted that removing one of the existing UNEs from the list could significantly disrupt the competitive telecommunications industry. As discussed below in the context of removing or "sunsetting" UNEs from the national minimum list, stringent protections are needed to ensure that CLECs relying upon a certain existing UNE do not suddenly find the "rug pulled out from under them" as that UNE is no longer available from the ILEC for use.

accompanying the Telecommunications Act of 1996 as it came out of conference, cited the local loop as an example of a UNE.⁴⁸ Moreover, as the Commission noted in its *Second Further NPRM*, even the ILECs have previously "agreed that the local loop is a network element that must be unbundled pursuant to Sections 251(c)(3) and 251(d)(2) of the Act."⁴⁹ Since there is no effective alternative to the ILEC loop in the local exchange market, CLECs would be required to build out their own facilities to each and every customer location if the loop were not available on an unbundled basis. Obviously, such construction is unrealistic and would greatly "impair" CLEC operations. Accordingly, the local loop must continue to be offered on an unbundled basis by ILECs.

2. Local and Tandem Switching

In considering whether local and tandem switching should be unbundled for competitive access, the ILECs will undoubtedly claim that their switching technology contains "proprietary" information such that unbundling should only be required if access is "necessary."⁵⁰ The response to such claims is twofold. First, as explained above, an element is not proprietary for the purposes of Section 251(d)(2) simply because proprietary information is embedded in it. An element should only be considered proprietary within the meaning of the statute if a CLEC's use of the element

⁴⁸ Joint Explanatory Statement of the Committee of the Conference, at 116.

⁴⁹ *Second Further NPRM*, at ¶ 32 (citing USTA Initial Comments, at 28; GTE Initial Comments, at 32-37; BellSouth Initial Comments, at 37-40; Bell Atlantic Initial Comments, at 22).

⁵⁰ See *Local Competition Order*, at 15710, ¶ 419 (U S WEST and Bell Atlantic raising proprietary claims relating to vendor restrictions).

would *reveal* the proprietary information. Moreover, information that is proprietary to a third party vendor does not meet the carrier-specific definition of "proprietary" that should be applied under the statute. Because there is no indication that there is any ILEC-specific information that might be disclosed if CLECs use unbundled switching, switching capability is not "proprietary" such that the "necessary" standard of Section 251(d)(2)(A) applies.

Second, even if local switching were considered proprietary under a strained meaning of that term, this element satisfies the "necessary" standard under the statute. It is true that CLECs can purchase switches from Lucent and other equipment vendors. This fact alone, however, does not mean that ILEC local switching is insulated from the unbundling requirements of the Act. While CLECs can utilize their switches together with other facilities to cover wider geographic areas than the traditional end office switch, there will certainly be areas that CLEC switches simply cannot reach. As noted by the Commission in the *Local Competition Order*, there are 23,000 central office switches across the country and there is no basis for concluding that competitors could duplicate the geographic reach of more than a minimal percentage of these switches.⁵¹ Thus, there is no effective available ubiquitous alternative to the ILEC switch, and competitive entry in many areas could stall from the inability to secure access to switching capability.⁵²

⁵¹ *Local Competition Order*, at 15705-06, ¶ 411.

⁵² It should also be noted that the Joint Explanatory Statement of the Conference Committee identifies "equipment, such as switching" in discussing what constitutes a network element under the Act. Joint Explanatory Statement, at 116.

Compelling CLECs to purchase switches in every instance would also impair their ability to provide service, by imposing unnecessary costs on their operations. In some markets, CLECs may need very little switching capacity to compete effectively with the ILEC. If they cannot gain access to unbundled switching in such cases, they simply will not enter the market – particularly when the only other option is to make an uneconomical and substantial investment by buying a switch to provide limited service in that area.

Under the "impair" standard in Section 251(d)(2)(B),⁵³ tandem switching should also continue to be made available to CLECs as a UNE. CoreComm is not aware of any practical or economical alternative to ILEC tandem switching that would permit CLECs to provide service at comparable cost, quality, ubiquity, and level of timeliness. Without access to such facilities on an unbundled basis, even CLECs that were able to replicate tandem switching to some degree might need to alter their network configurations dramatically – and at significant cost – to ensure the proper completion of calls throughout a geographic area.

3. Interoffice Transmission Facilities

As it has begun to explore the options for transport available among ILECs and alternative suppliers, CoreComm has found that ILEC transport facilities are often the only means by which CoreComm will be able to secure ubiquitous, operationally efficient access to the end offices where CoreComm will need to deliver traffic. Moreover, in markets where the ILEC's transport facilities

⁵³ See *Local Competition Order*, at 15713, ¶ 425 ("Parties do not contend, pursuant to section 251(d)(2)(A), that tandem switches are proprietary in nature.")

have been priced in accordance with the forward-looking cost methodology specified in Section 252(d)(1) of the Act,⁵⁴ these facilities may often represent the most economical means available to CLECs for delivering traffic. There is also the concern that if a CLEC is using an ILEC's unbundled loop, the transport facilities it acquires from another source may not be entirely interoperable with the loop, meaning that the CLEC will experience technical obstacles to competing effectively with the ILEC. Because the absence of unbundled transport from the ILEC would "impair" CLECs' ability to compete in terms of ubiquity, cost, and interoperability, the Commission should reaffirm that ILECs are required to offer unbundled transport to CLECs under Section 251(c)(3) of the Act.⁵⁵

4. Databases and Signaling Systems

In reviewing the comments filed prior to the initial *Local Competition Order*, the Commission observed that "[a]lmost all parties, including incumbent LECs, support the Commission's tentative conclusion to require incumbent LECs to unbundle access to their signaling systems."⁵⁶ CoreComm is aware of no developments over the past three years that would prompt parties to come to different conclusions with respect to the unbundling of databases and signaling

⁵⁴ 47 U.S.C. § 252(d)(1) (1996).

⁵⁵ The Commission should also clarify that ILECs are required to make the full range of transport facilities available on an unbundled basis, including SONET rings and all transport options that are available under tariff. Under the statutory interpretation provided herein, there is no reason to exclude these transport options from the unbundling obligation.

⁵⁶ *Local Competition Order*, at 15725, ¶ 460 (citing, among others, Ameritech Comments, at 46-47; BellSouth Comments, at 43; NYNEX Comments, at 71; PacTel Comments, at 57-60).

systems now. Signaling systems and call-related databases – such as LIDB and AIN databases for the purpose of switch query and database response through the SS7 network – remain critical to the provision of telecommunications services. Yet, as the Commission originally found in the *Local Competition Order*, there is the likelihood that alternatives to ILEC signaling systems, such as in-band signaling, would provide a lower quality of service.⁵⁷

Moreover, requiring new entrants to incur the cost of deploying a redundant network architecture, including call-related databases, would significantly impair the ability of CLECs to compete in the local exchange market. The alternatives available from third parties do not provide great promise. It is CoreComm's understanding that, where available, the costs of database and signaling services from independent vendors generally exceed the cost of similar services available from the ILECs on an unbundled basis. In short, unavailability of incumbent LEC signaling systems and call related databases as a UNE would impair competitors in terms of ubiquity, quality, and cost. CoreComm therefore urges the Commission to reaffirm that databases and signaling systems will remain on the national minimum list of UNEs that must be made available by ILECs.

5. Operations Support Systems ("OSS")

CoreComm submits that it would be virtually impossible for any CLEC to compete effectively with an ILEC without obtaining nondiscriminatory access to information in the ILEC's OSS. Absent such access, CLECs cannot hope to serve customers, respond to customer trouble

⁵⁷ *Local Competition Order*, at 15740, ¶ 482.

reports, or process customer bills in as timely and efficient manner as the ILEC can through use of its OSS. Indeed, even if one accepts as true the inevitable ILEC claims that OSS constitutes a "proprietary" element within the meaning of Section 251(d)(2)(A), access to OSS is "necessary" if CLECs are going to compete on relatively equal footing with the ILECs for each and every customer.⁵⁸ Accordingly, the Commission should redesignate access to OSS as a UNE.

6. Network Interface Device

The network interface device ("NID") is the "cross-connect device used to connect loop facilities to inside wiring."⁵⁹ As a provider of residential service, where CoreComm deploys its own loops, it will be essential that CoreComm also obtain nondiscriminatory access to the NID so that it can connect loops through house and riser cable to inside wiring in multi-tenant buildings and other customer premises. Requiring a carrier such as CoreComm to also find a way to install or replace the ILEC's NID would "impair" the CLEC's ability to compete by placing prohibitive practical and economic limitations on its delivery of service to specific customer premises. Accordingly, the Commission should redesignate the NID as a UNE.

⁵⁸ Obviously, if a UNE satisfies the "necessary" standard, its absence would also "impair" the ability of CLECs to compete in the local exchange market. CoreComm would dispute, however, the very claim that OSS is a "proprietary" network element as that term is used in Section 251(d)(2)(A). As noted above, "proprietary" should be defined narrowly, so that only when proprietary information is disclosed through the use of a UNE is a network element considered "proprietary" under the statute. Although orders are placed through an interface (or a document may be typed using Windows operating software), the user does not "see" the underlying information that might be considered "proprietary" by its maker.

⁵⁹ *Local Competition Order*, at 15697, n. 852.

In addition, CoreComm has found that several ILECs have taken the position that the NID is inseparable from the loop, in that they have required CLECs purchasing a loop to purchase and pay for the NID as well. While in most cases CoreComm would prefer to purchase the NID along with the ILEC's loop, there are circumstances in which CoreComm would prefer to use its own NID, and thereby avoid paying for the ILEC's NID. This is the essence of unbundling: being able to purchase one element without being required to purchase the other. The Commission should clarify that both the loop and the NID are available separately from one another, and that the loop should be priced separately from the NID, so that a CLEC choosing to install its own NID need not pay for the ILEC's NID.

7. Operator Services and Directory Assistance

ILECs should continue to be required to make their operator and directory assistance services (collectively, "OS/DA") available to CLECs on an unbundled basis. Although the ILECs have consistently argued that OS/DA can be obtained from "alternative providers,"⁶⁰ this is not always the case. Indeed, concerns relating to expense, interoperability, or ubiquity may prevent a CLEC from making use of the services of third parties that provide OS/DA independently. Without ubiquitous access to OS/DA, CLECs cannot provide their customers with the same call completion, rate guidance, and directory services that ILECs make available to similarly situated customers. The

⁶⁰ See *id.* at 15769, ¶ 830.

absence of OS/DA on an unbundled basis would therefore "impair" CLECs' ability to compete with the ILECs for each and every local service customer.⁶¹

B. Other Network Elements Should be Made Available on an Unbundled Basis Pursuant to Section 251(d)(2)(B) and in Accordance with the Goals of the Act.

The Commission has asked for comment on whether other network elements should be unbundled pursuant to the criteria set forth in Section 251(d)(2).⁶² CoreComm believes that there are several other network elements that satisfy the statutory unbundling criteria. Indeed, in light of the fact that competition in the local exchange market has been slow to take root even with the existing list of UNEs, CoreComm submits that designating additional UNEs to be made available to competitors would promote the Act's purpose of delivering the benefits of competition to the nation's purchasers of local telephone services. Specifically, for the reasons explained below, the following network elements should be designated as UNEs.

1. Sub-Loop Elements

Loops consist of feeder and distribution plant, electronic components, and interfaces between the feeder and distribution. Just as it is not economically or technically possible for CLECs to deploy loops from end-to-end, they cannot be expected to deploy loop components in many

⁶¹ CoreComm notes that in the original rulemaking in this docket "[p]arties generally did not identify proprietary concerns with unbundling access to operator call completion services or directory assistance." *Id.* at 15774, ¶ 539. Thus, access to OS/DA on an unbundled basis should be considered under the standards set forth in Section 251(d)(2)(B) of the Act.

⁶² *Second Further NPRM*, at ¶ 33.

instances. In those circumstances where a CLEC determines that it would be technically, operationally, and/or economically more efficient to deploy its own sub-loop facilities to provide service to a certain segment of the customer base, however, it may need only a portion of the loop from the ILEC to complete the transmission facility. Moreover, it could prove critical for CLECs to obtain access to only a portion of the ILEC loop in order to provide the kinds of advanced services that cannot be offered over the existing end-to-end ILEC loop facility to a customer location. For example, where an ILEC loop incorporates certain digital loop carriers, the presence of such electronic components may prevent the CLEC from using that ILEC loop to provide the kinds of services demanded by a customer. If a CLEC cannot effectively "build around" that portion of the loop by combining its own facility with a sub-loop component of the ILEC network, the CLEC's ability to provide the desired services is impaired. In turn, certain segments of the customer base – such as residential customers living outside of densely populated areas – will not be able to obtain the benefits of advanced service offerings that would otherwise be made available by competitive providers. Several jurisdictions have already found that sub-loop unbundling is needed in the local

exchange market.⁶³ The Commission should likewise require ILECs to provide electronic components of the loop, feeder, drops, and distribution plant as UNEs.

2. Inside Wiring

For the same reasons that CLECs need access to the entire loop and individual components of the local loop, they also require access to the inside wiring that effectively forms the final leg of the loop. As a provider seeking to offer residential service to customers in multi-tenant dwelling units, it is particularly important to CoreComm that it be able to make use of both the loop leading to the building as well as the existing inside wiring leading to the customer's line. Absent such access, CoreComm faces the prospect and expense associated with securing the ability to run redundant wires and then running such wires. Requiring a CLEC to undertake such efforts could substantially impair its ability to provide competitive services to these multi-tenant locations. The Commission should therefore designate customer premises wiring as a UNE.

On a related note, the Commission should designate premises and building entrance facilities – such as junction and utility boxes, house and riser cable, and horizontal distribution plant – as

⁶³ See, e.g., *Public Utilities Commission Instituting a Proceeding on Communications, Including an Investigation of the Communications Infrastructure of the State of Hawaii*, Docket No. 7702, Decision and Order (Haw. P.U.C. Jan. 7, 1999) (clarifying that "subloop unbundling is included in the unbundled elements"); *AT&T Communications of the Pacific Northwest, Inc.*, Order No. 97-003, ARB 3, ARB 6 (Ore. P.U.C. Jan. 6, 1997) (upholding arbitrator's decision to require U S WEST to unbundle sub-loop components); *AT&T Communications of the Southern States, Inc.*, Docket Nos. 960847-TP, 960980-TP (Fla. P.S.C. Jan. 17, 1997) (directing GTE to unbundle loop distribution, loop concentrator/multiplexer, and loop feeder); *MCI Telecommunications Corporation*, Docket No. 6865-U, Order (Ga. P.S.C. Dec. 17, 1996) (directing BellSouth to unbundle loop distribution).

UNEs. Requiring that such items be offered on an unbundled basis would ensure that CLECs can access those portions of inside wiring that are necessary to provide service.

3. Extended Loop

Although CLECs seeking to use UNEs may often collocate in an ILEC's central office to connect those UNEs, unavailability of space for physical collocation may make this impossible.⁶⁴ Even where collocation space is available, the CLEC may serve a relatively small number of customers whose loops terminate in that central office, making it prohibitively expensive for the CLEC to collocate in that central office. Yet, in many cases, a CLEC may want to use unbundled loops from the ILEC together with its own network facilities to provide services to customers associated with a particular ILEC central office. Under such circumstances, the CLEC will need to use an unbundled loop together with unbundled transport to reach the customers, but will not be able to combine these elements through a multiplexer because it does not have collocation space in the central office in question in which to place the multiplexer. This inability to combine the loop and the transport prevents the CLEC from serving customers wishing to avail themselves of the CLEC's services. CoreComm therefore urges the Commission to designate the "extended loop," which is comprised of the loop, multiplexer, and transport, as an individual UNE. The Commission should

⁶⁴ When this happens, virtual collocation may be available, but virtual collocation may not be desirable because the CLEC must relinquish the ability to operate and maintain the collocated equipment to the ILEC.

also make clear that CLECs are entitled to unencumbered access to such extended loops, so that ILECs cannot place restrictions on their use⁶⁵

4. Conditioned Loops

The Commission has previously found that CLECs need to have access to conditioned loops from the ILEC in order to provide certain advanced telecommunications services.⁶⁶ The unavailability of conditioned loops would therefore impair CLECs' ability to provide certain advanced services. CoreComm urges the Commission to designate conditioned loops as UNEs that must be made available by the ILEC on a nondiscriminatory basis.

5. Dark Fiber

Dark fiber is an unused ILEC fiber transmission facility that could be used by others in the provision of telecommunications services if appropriate electronic equipment were attached to power the facility. While fiber is being used on an increasing basis by many providers in the telecommunications industry because of its desirability as a transmission facility, the ILECs generally will have more fiber facilities available for use as a result of the ubiquity of their networks. As in the case of loop and interoffice transport facilities, it is not possible as a practical or economic

⁶⁵ In both New York and Texas, it is CoreComm's understanding that the ILECs will make extended loops available on an unbundled basis only if CLECs do not use them for special access circuits (Texas) or anything other than local voice-grade service (New York).

⁶⁶ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 (1998), at ¶¶ 52-53.

matter for most CLECs entering the market to self-provision fiber on all routes (or completely along a route). Moreover, it is not possible for CLECs to obtain from third parties in any economic manner the individual fiber components that could be used as a UNE in a specific instance. Thus, the CLECs' inability to access dark fiber impairs their ability to compete on equal footing with the ILECs for specific customers.⁶⁷ The Commission should direct that dark fiber be made available to CLECs on an unbundled basis pursuant to Sections 251(d)(2)(B) and 251(c)(3).

V. THE COMMISSION SHOULD TREAD CAREFULLY IF IT CONSIDERS REMOVING A NETWORK ELEMENT FROM "UNE STATUS."

The Commission has asked for comment on whether it should adopt a mechanism by which the requirement to unbundle individual network elements would terminate.⁶⁸ As a preliminary matter, CoreComm notes that the Commission should tread carefully in this area, because denying CLECs access to UNEs that they have previously used to reach customers could have service-affecting implications. Indeed, even if for some reason it was determined that an existing UNE no longer met the unbundling standards in Section 251(d)(2), CLECs cannot "flash cut" to alternative sources for that element. Thus, if the Commission were in fact to establish a procedure by which a UNE could effectively be removed from "UNE status," it would need to adopt stringent protections (such as "grandfathering" requirements) as part of that procedure to ensure that CLECs are not left

⁶⁷ Just because the ILEC does not find the use of dark fiber necessary at a given moment – hence, its "dark" nature – does not mean that its unavailability would not impair a CLEC's ability to provide service.

⁶⁸ *Second Further NPRM*, at ¶ 36.

unable to serve existing customers simply because the Commission has found that the ILEC need not make the UNE available going forward.

Moreover, if a mechanism for removing UNEs from "UNE status" is adopted, the Commission should ensure that effective functional equivalents for that UNE are truly available throughout the market. Even though there may be opportunities for CLECs to avail themselves of facilities provided by other carriers, that should not be the focus of the Commission's inquiry. Rather, the Commission would need to consider the very same factors that led it to designate a network element as a UNE in the first instance. If the transport facilities offered by other carriers (as opposed to the ILEC) would drive up a CLEC's cost of providing service in some material respect, the availability of transport from alternative providers cannot be considered an effective functional substitute for the ILEC's unbundled transport. Similarly, if it takes alternative suppliers substantially longer time to provide loop facilities, it cannot be said that an effective functional substitute to the ILEC's unbundled loops exists. The Commission should therefore maintain the existing list of UNEs until it is demonstrated that a functional equivalent to an individual network element is available elsewhere in the telecommunications marketplace.⁶⁹

Given the procompetitive purpose of making these UNEs available in the first instance, the ILECs should bear the burden of demonstrating that unbundling of a network element is no longer

⁶⁹ See *id.* at ¶ 42 (seeking comment on whether the existence of a competitive market is necessary to demonstrate that an element is sufficiently available outside the incumbent's network so that failure of the incumbent to provide the element would not contravene the Act).

required under the Act.⁷⁰ Since it will almost certainly be the ILECs that is seeking a change from the status quo, it makes sense that the ILECs should bear the burden of proving that "relief" is warranted by eliminating unbundling requirements. On a related note, even if the Commission has the authority to do so, CoreComm vigorously opposes the concept of using "sunset" provisions to phase out unbundling requirements.⁷¹ It would be artificial and arbitrary to pick now a date in the future upon which a particular UNE will no longer be "necessary," or to guess the date upon which the absence of a UNE will no longer "impair" CLEC operations. The list of UNEs is adopted in this proceeding, as supplemented by this Commission or the state commissions, should stand in the absence of specific and compelling evidence that the inclusion of a particular network element on the list is in error.

VI. CONCLUSION

This rulemaking is critical in ensuring that CLECs have access to the network components they require to compete effectively with incumbents in the local exchange market. Nothing in the Supreme Court's *Iowa Utilities Board* decision limits the Commission's ability to make these network components available to competitors. Instead, all that is required by the Supreme Court's decision is that the Commission articulate the reasons for making certain UNEs available in light of the provisions of Section 251(d)(1) and the goals of the Act. Even with the existing list of UNEs, local competition has been slow to take root. Reaffirming the availability of the UNEs on this list

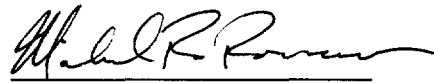
⁷⁰ See *id.* at ¶ 37.

⁷¹ See *id.* at ¶ 39.

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– and supplementing the existing list with other UNEs to which competitors may obtain access – would be consistent with the goals of the Act and the statutory unbundling standards contained in Section 251(d)(1). For the reasons set forth herein, the Commission should confirm that the "original" seven UNEs must continue to be made available, and rule that CLECs should also be able to access other UNEs integral to effective competitive entry.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael R. Romano", written over a horizontal line.

Eric J. Branfman
Michael R. Romano
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (tel)
(202) 424-7645 (fax)

Dated: May 26, 1999

Counsel for CoreComm Limited

CERTIFICATE OF SERVICE

I, Michael R. Romano, hereby certify that I have on this 26th day of May, 1999, served copies of the foregoing Comments of CoreComm Limited on the following via hand delivery as indicated and also via electronic filing.*

Magalie Roman Salas, Esq. (orig. + 12)*
Secretary
Federal Communication Commission
445 12th Street, S.W.
Washington, DC 20554

Janice Myles (1)
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C327
Washington, DC 20554

ITS (1)
1231 20th Street, N.W.
Washington, DC 20554



Michael R. Romano